Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING APPLICATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

REYNOLD H. COLVIN,
ROBERT D. LINKS,
JACOBS, BLANCKENBURG, MAY & COLVIN,
111 Sutter Street, Suite 1800,
San Francisco, California 94104,
Telephone: (415) 392-5164,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO. - 592 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Page

Statutory Provision Involved 1

Introduction and Summary of Argument 1

Argument 4

I.

The Title VI Issue is Properly Before the Court 4

II.

Bakke Has a Private Right of Action Under Title VI .. 11

III.

Bakke Was Not Required to Resort to HEW Administrative Procedures Prior to Commencing This Litigation 16

IV.

The Special Admission Program Violates Title VI 23

A. The program violates the plain language of Section 2000d 23

B. The legislative history of the Civil Rights Act of 1964 indicates that racial preference programs such as petitioner's quota are illegal 26

C. The HEW Title VI regulations themselves prohibit racial quotas 31

D. Recent judicial decisions support the conclusion that petitioner's special admission program is unlawful 36

Conclusion 38

Table of Authorities Cited

Cases

	Pages
Anderson v. San Francisco Unified School District, 357 F. Supp. 248 (N.D.Cal. 1972)	38
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	10
Bell v. Hood, 327 U.S. 678 (1946)	15
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	8
Boissier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967)	12
Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973)	9
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4
Castaneda v. Partida, 430 U.S. 482 (1977)	25
Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 (1975)	28
Cort v. Ash, 422 U.S. 66 (1975)	12, 16
Dandridge v. Williams, 397 U.S. 471 (1970)	5, 8, 9
Dixon v. United States, 381 U.S. 74 (1965)	35
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)	35
Far East Conference v. United States, 342 U.S. 570 (1952)	20
Fashnacht v. Frank, 90 U.S. (23 Wall.) 416 (1875)	8
Fay v. Noia, 372 U.S. 391 (1963)	4
Fox Film Corp. v. Mullen, 296 U.S. 207 (1935)	4
Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976)	36, 37
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	35
Girouard v. United States, 328 U.S. 61 (1946)	31
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	26
Herb v. Pitcairn, 324 U.S. 117 (1944)	5
International Harvester Co. v. Missouri, 234 U.S. 199 (1914)	8
Irvine v. California, 347 U.S. 128 (1954)	4
Jaffke v. Dunham, 352 U.S. 280 (1957)	9
Langnes v. Green, 282 U.S. 531 (1931)	5, 9, 10
Lau v. Nichols, 414 U.S. 563 (1974)	11, 12
Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977)	12
Lynch v. Tilden Produce Co., 265 U.S. 315 (1924)	35

	Pages
Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936)	35
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)	25, 26, 27, 33
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	25, 33
McKart v. United States, 395 U.S. 185 (1969)	21
Miller v. United States, 294 U.S. 435 (1935)	35
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)	9
Morley Constr. Co. v. Maryland Cas. Co., 300 U.S. 185 (1937)	9
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973)	35
Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875)	4
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938)	21
Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers, 414 U.S. 453 (1974)	13
Natonabah v. Board of Education, 355 F. Supp. 716 (D.N.M. 1973)	12
NLRB v. Int'l Van Lines, 409 U.S. 48 (1972)	10
Philbrook v. Glodgett, 421 U.S. 707 (1975)	28
Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976)	12
Richards v. United States, 369 U.S. 1 (1962)	28
Rosado v. Wyman, 397 U.S. 397 (1970)	22, 23
Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975)	13
Strunk v. United States, 412 U.S. 434 (1973)	9
Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	20
Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U.S. 138 (1914)	20
Trans World Airlines v. Hardison, 97 S.Ct. 2265 (1977)	26, 27
United States v. American Ry. Express Co., 265 U.S. 425 (1924)	4, 5, 9
United States v. Heirs of Boisdoré, 49 U.S. (8 How.) 113 (1849)	28
United States v. Shirey, 359 U.S. 255 (1959)	8

Pages

United States v. Western Pacific R.R., 352 U.S. 59 (1956) 19, 20
Uzzell v. Friday, 547 F.2d 801 (4th Cir. 1977) 25, 37

Ward v. Winstead, 314 F. Supp. 1225 (N.D. Miss. 1970) .. 11
Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973) 20

Zuber v. Allen, 396 U.S. 168 (1969) 31

Constitutions

United States Constitution:
Fourteenth Amendment 4, 5, 6, 7, 37, 39

Statutes

Civil Rights Act of 1964:
Title I (42 U.S.C. § 1971) 26
Title II (42 U.S.C. §§ 2000a, et seq.) 26
Title VI (42 U.S.C. §§ 2000d, et seq.) ..... passim
Title VII (42 U.S.C. §§ 2000e, et seq.) 22, 26, 27, 28, 29
Civil Rights Act of 1871 (42 U.S.C. § 1983) 37
Emergency School Aid Act of 1972:
Title IX (20 U.S.C. §1681(a)) 12
Food, Drug & Cosmetic Act of 1938:
(21 U.S.C. § 321(p)(1)) 20
Rehabilitation Act of 1973:
Title V (29 U.S.C. § 794) 12

Regulations

45 C.F.R. Part 80 31
§ 80.2 14
§ 80.3 ..... 24, 31, 32, 33, 34
§ 80.5 ..... 32, 33, 34, 35
§ 80.7 ..... 14, 17, 18
§ 80.8 ..... 14, 18, 21, 22
§ 80.9 ..... 18, 22
§ 80.10 ..... 14, 15, 18
§ 80.13 ..... 18, 24

Legislative Reports

Pages

110 Cong. Rec. 5255 (1964) (remarks of Sen. Case) 13, 14
110 Cong. Rec. 6047 (1964) (remarks of Sen. Pastore) 28
110 Cong. Rec. 7207 (1964) (reply to arguments made by Sen. Hill) 29, 30
110 Cong. Rec. 7213, 7218 (1964) (memorandum of Sens. Clark and Case) 29, 30

Texts and Other Authorities

Bureau of Nat'l Affairs, Inc., The Civil Rights Act of 1964, Operations Manual (1964) 28
Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev., 810 (1974) 30
Stern, When to Cross-Appeal or Cross-Petition—Certainty or Confusion? 87 Harv. L. Rev. 763 (1974) 9, 10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING APPLICATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

STATUTORY PROVISION INVOLVED

Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§2000d, *et seq.*) provides in pertinent part:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief is submitted on behalf of respondent Allan Bakke pursuant to the Court's request for a

supplemental brief discussing Title VI of the Civil Rights Act of 1964[1] as it applies to this case. The statutory question arises because petitioner, a recipient of Federal funding, adopted a racial quota admission policy at the Davis Medical School and, as a result, caused Bakke to be excluded from the school.

In the sections that follow, we explain that the Title VI issue is properly before the Court. The statute was raised by both Bakke and the University in the trial court and was cited by each of them in the court below. Although the California Supreme Court based its decision upon Federal constitutional grounds, Bakke may rely upon Section 2000d in support of his assertion that the judgment be affirmed. The previous decisions of this Court establish that, as respondent, Bakke may rely upon any Federal ground properly appearing in the record.

There is no dispute that petitioner's special admission program discriminates on the basis of race. Before reaching the question of whether the program violates Section 2000d, however, it is necessary to resolve two preliminary matters. The first is whether Title VI creates a private right of action. We submit that it does. The statute creates an individual, substantive right not to be discriminated against in Federally funded programs and a private cause of action is required to protect that right. The legislative history of Title VI clearly anticipates individual

[1] 42 U.S.C. §§2000d, *et seq.* (hereinafter referred to as "Title VI", "Section 2000d" or "the statute").

suits and, indeed, a review of the regulatory enforcement procedures under the statute reveals that the individual has no viable administrative remedy which can compel a correction of previous discrimination.

The second preliminary matter concerns the related questions of whether the Department of Health, Education and Welfare (HEW) has primary jurisdiction over Bakke's Title VI claim and whether he must exhaust HEW administrative procedures prior to filing suit. The previous decisions of this Court, as well as forceful considerations of policy, dictate that these inquiries must be answered in the negative. There are no administrative procedures designed to adjudicate Bakke's complaint or to order the relief he seeks. In addition, there is no reason for the Court to defer to administrative "expertise". Although such deference might be justified in a case involving technical questions within the special competence of another federal body, this case is of a different order. It involves a claim of racial discrimination and the issues presented are ones to be decided by the judiciary, not an administrative agency.

In reaching the merits of the Title VI claim, we demonstrate that petitioner's racial quota system clearly violates the statute. The quota contravenes the plain language of Section 2000d which expressly outlaws any racial discrimination in Federally funded programs. It is equally condemned by the legislative intent behind the statute and the HEW regulations promulgated under it. Several recent judicial decisions confirm this analysis.

The Court thus has two bases upon which to sustain the holding of the California Supreme Court. The Court may affirm the judgment below by relying on the Fourteenth Amendment or may reach the same conclusion by relying upon Title VI. Regardless of the ground chosen, the decision rendered and the relief awarded should be the same. Petitioner's racial quota admission policy should be struck down as illegal and Allan Bakke, who was barred as a result of the quota, should be ordered admitted to the medical school.

ARGUMENT

I.

THE TITLE VI ISSUE IS PROPERLY BEFORE THE COURT.

At the outset it is appropriate to set forth briefly some of the things this case does *not* involve. This is not a case in which a party seeks to raise an issue for the first time on appeal. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Nor is this a case in which review was sought on one issue and, once granted, the petitioning party attempted to shift ground to another question. *Irvine v. California*, 347 U.S. 128, 129-30 (1954). Nor is this a case in which the respondent seeks to enlarge or alter the judgment of the court below. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). Finally, this is not a decision of a state court which is based upon an independent and adequate state ground. *Fay v. Noia*, 372 U.S. 391, 428-30 (1963); *Fox Film Corp. v. Mullen*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 632-36 (1875).

What is present here is the judgment of the California Supreme Court affirming a trial court decision that petitioner's special admission program is invalid. The decision of the California Supreme Court is based exclusively on Federal grounds. Although the court discussed only the Federal constitutional issue, a parallel statutory claim—grounded in Title VI of the Civil Rights Act of 1964—was properly within the appellate record. A long line of this Court's decisions establishes beyond doubt that the statutory claim, which has been a part of this case from the very beginning, can now be raised by respondent in support of the judgment below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Langnes v. Green*, 282 U.S. 531, 537-38 (1931); *United States v. American Ry. Express Co., supra.* On certiorari to a state court, this Court has the power to review *all* federal questions presented by the record. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1944).

An examination of the record reveals that the Title VI claim was pleaded by *both* parties at the inception of this litigation. Bakke included the statute in his complaint as one of his grounds for relief. R. 1-5.[2] The University asserted the statute in its cross-complaint for declaratory relief. R. 29-31.[3] The

---

[2]The complaint alleges in part:

> ". . . That by reason of the action of [petitioner] in excluding [Bakke] from the first-year medical school class under [petitioner's] minority preference admission program, [Bakke] has been invidiously discriminated against on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . . .

trial court, in ruling specifically on the University's cross-complaint, held that the special admission program violates Section 2000d:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED:
>
> * * *
>
> . . . Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution . . . *and the Federal Civil Rights Act* [*of 1964* (42 U.S.C. §2000d)]. . . ." R. 394 (emphasis added).

---

and the Federal Civil Rights Act [of 1964 (42 U.S.C. §2000d)] . . . ." R. 3.

The prayer of the complaint goes no further than Bakke's individual case of discrimination. Under his three causes of action (mandamus, injunctive relief, and declaratory relief) Bakke asked the trial court for basically one thing: a judgment that would permit him to enroll at the Davis medical school. R. 4. The question of whether the special admission program should be declared invalid was raised by petitioner's cross-complaint for declaratory relief. *See* note 3, *infra*.

[3]The cross-complaint reads in part:

> "An actual controversy has arisen and now exists between the University and [Bakke] relating to whether the special admissions program . . . violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . . . and/or the federal Civil Rights Act (42 U.S.C. §2000(d)) . . .
>
> . . . The University desires a declaration with respect to the validity of said special admissions program so that it may ascertain its rights and duties with respect to the evaluation of [Bakke's] application and others.
>
> WHEREFORE, the University prays for a judgment declaring the rights and duties of it and [Bakke] under said special admissions program and that it be declared that said special admissions program is lawful." A. 30-31.

The University's appeal from that judgment placed the constitutional and statutory issues before the California Supreme Court. R. 398-99.

In its opening brief on appeal, the University contended that the special admission program was authorized by Title VI.[4] Bakke argued the opposite, pointing out that while this case involves constitutional issues, it "also involves the application of the . . . Federal Civil Rights Act of 1964 (42 U.S.C. §2000d)."[5]

In affirming the trial court judgment as to the invalidity of the special admission program, the California Supreme Court discussed only the Federal constitutional issue. The court's silence as to Title VI, however, does not alter the fact that the statutory

---

[4]Opening Brief of Appellant and Cross-Respondent, Bakke v. The Regents of the University of California, 18 Cal. 3d 34 (1976) at 34-35.

[5]Reply Brief of Plaintiff, Respondent and Cross-Appellant, Bakke v. The Regents of the University of California, 18 Cal. 3d 34 (1976) at 2 n.1. The brief just cited was Bakke's second brief in the court below. In his opening brief, Bakke raised the statutory claim as follows:

> "The [California Supreme Court] must consider whether [petitioner's] program violates the command of the Fourteenth Amendment that no state shall 'deny to any person within its jurisdiction the equal protection of the laws' . . . or the command of the Federal Civil Rights Act of 1964 (42 U.S.C. §2000d) that 'no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.' "

Reply Brief as to Appeal and Opening Brief as to Cross-Appeal of Plaintiff, Respondent and Cross-Appellant, Bakke v. The Regents of the University of California, 18 Cal. 3d 34 (1976) at 13-14. Because Section 2000d "in many ways parallels" the Fourteenth Amendment, the statute was not separately discussed in Bakke's briefs. *Id.* at 14 n.1.

question was properly raised on appeal. *International Harvester Co. v. Missouri*, 234 U.S. 199, 207 (1914). Moreover, the particulars of the state court's opinion do not affect Bakke's right to assert Section 2000d in support of the California Supreme Court decision. He may urge any federal ground properly appearing in the record. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).[8]

It is important to note that in availing himself of Title VI, Bakke does not seek to alter or expand the result below. He asks only that the judgment be *affirmed*, and that the order of the California Supreme Court declaring the program invalid and mandating his admission to the medical school be upheld. As the Court has noted on many occasions, a respondent may rely upon grounds not invoked by the court below:

> "[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record,

[8]The crucial inquiry is not whether the court below mentioned the alternate grounds in its opinion, but rather, whether the grounds were properly before the court. As stated in International Harvester Co. v. Missouri, 234 U.S. 199, 207 (1914):

> "It is true the [lower] court has not referred to [the separate grounds] in its opinion, but we cannot regard its silence as a condemnation of the time or manner at or in which they were raised."

It is axiomatic that the Court "reviews judgments, and not statements in opinions". Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956); United States v. Shirey, 359 U.S. 255, 261 n.5 (1959) (Frankfurter, J.). As the Court held over a century ago:

> "We act only upon the judgment of the [court below]. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error." Fashnacht v. Frank, 90 U.S. (23 Wall.) 416, 420 (1875).

> although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the [appellee] does not attack in any respect the decree entered below. It merely asserts additional grounds why the decree should be affirmed." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924).

The Court followed this approach in *Langnes v. Green*, 282 U.S. 531 (1931), and in several later decisions. *E.g., Jaffke v. Dunham*, 352 U.S. 280 (1957) (per curiam); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). The rule that a respondent may urge in support of a decree any matter properly appearing in the record—the so-called *Langnes* doctrine[7]—thus may be termed "inveterate and certain". *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937) (Cardozo, J.).

Petitioner's contention at oral argument that the Court recently changed this rule is mistaken.[8] Although in certain recent cases the Court prevented a respondent from relying upon an alternate ground, the Court did not overrule or expressly alter the traditional rule. *See, e.g., Strunk v. United States*, 412 U.S. 434, 437 (1973); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516, 521 (1973); *NLRB v. Int'l*

[7]*See* Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?* 87 Harv. L. Rev. 763 (1974) (hereinafter cited as "Stern").

[8]Tr. of Oral Arg. at 22-23.

Van Lines, 409 U.S. 48, 52 n.4 (1972). Indeed, there is no mention at all in these decisions of the *Langnes* doctrine; and in each case, the respondent, in asserting the alternate ground, sought to attack in some way the holding as well as the reasoning of the lower court. As pointed out above, the present case is different. Bakke *agrees* with the judgment of the California Supreme Court; he now asserts an additional, separate ground upon which the decision should be affirmed.

At most, these recent decisions indicate that judicial discretion may be exercised in determining when to permit a respondent to raise alternate grounds in support of a ruling below.[9] In the instant case, the Court's discretion should be exercised in favor of permitting Bakke to raise the statutory claim, for Title VI may well be the most appropriate ground upon which to decide the case. As Justice Brandeis observed in his classic concurring opinion in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936):

[9]*See* Stern, *supra* note 7, at 769-70; *Id.* at 774, 779:

"The sound principle underlying the *Langnes* doctrine is that appeals are to be taken from portions of a court's order which a litigant seeks to change, not from parts of an opinion in which the litigant disagrees."

• • •

. . . [N]o good reason has been advanced which outweighs the basic consideration that a party satisfied with a judgment should not have to appeal from it in order to defend it on any ground which the record and law permit."

• • •

Indeed, the Court probably more often than not takes a case as a whole, not restricting the petitioner to particular questions, and the same policy should govern points raised by the respondent."

"The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter."[10]

II.

BAKKE HAS A PRIVATE RIGHT OF ACTION UNDER TITLE VI.

At oral argument, petitioner's counsel questioned whether an individual could sue the University under Title VI.[11] A number of factors, including the previous holdings of this Court, combine to establish such a cause of action. Indeed, the decision in *Lau v. Nichols,* 414 U.S. 563 (1974), appears to answer the question. In *Lau,* non-English speaking Chinese students claimed that the San Francisco Unified School District was providing them with unequal educational opportunities in violation of Section 2000d. Implicit in the Court's ruling—which sustained the allegation of discrimination—is the recognition of a private right of action under Title VI.[12] Lower federal courts have expressly reached the same conclusion. *See, e.g.,*

[10]*See, e.g.,* Ward v. Winstead, 314 F.Supp. 1225, 1235 (N.D. Miss. 1970). In *Ward,* the District Court relied upon Title VI so as to avoid decision on a constitutional question.

[11]Tr. of Oral Arg. at 23.

[12]The Court's opinion in *Lau* did not expressly discuss the question of private right of action under the statute. The plaintiffs' right to bring the suit, however, appears to have been

Boissier Parish School Board v. Lemon, 370 F.2d 847, 851-52 (5th Cir.), *cert. denied,* 388 U.S. 911 (1967); *Natonabah v. Board of Education,* 355 F. Supp. 716, 724 (D.N.M. 1973).[12]

These decisions are entirely consistent with the judicial guidelines which govern private suits to enforce statutory rights. The relevant considerations were set forth in *Cort v. Ash,* 422 U.S. 66, 78 (1975) (citations omitted) (emphasis by the Court):

> "In determining whether a private remedy is implicit in a statute not expressly providing one,

considered. Lau v. Nichols, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring).

Moreover, the United States, which represents the various Federal funding agencies charged with monitoring the use of Federal funds, filed a brief amicus curiae in *Lau* which specifically recognized a private right of action to seek injunctive relief under Title VI. The government's brief in *Lau* states:

> "It is settled that petitioners, as representatives of the class of affected children, have standing to enforce Section [2000d], and that injunctive relief is an appropriate remedy." Brief of United States as Amicus Curiae, Lau v. Nichols, 414 U.S. 563 (1974) at 13 n.5.

[12]In addition, the courts have recognized a private right of action in two analogous situations. The courts have permitted individuals to sue to enforce Title IX of the Emergency School Aid Act of 1972 (20 U.S.C. §1681(a)), which prohibits sex discrimination. Piascik v. Cleveland Museum of Art, 426 F. Supp. 779, 780 n.1 (N.D. Ohio 1976). The courts also have recognized a similar cause of action to enforce Title V of the Rehabilitation Act of 1973 (29 U.S.C. §794), which prohibits discrimination against handicapped individuals. Lloyd v. Regional Transportation Authority, 548 F. 2d 1277, 1284-87 (7th Cir. 1977). These two statutes closely track the language of Section 2000d, as they govern Federally financed activity. The rehabilitation statute, for example, provides that:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794.

> several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

See also Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); *Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers,* 414 U.S. 453 (1974).

All of these considerations are satisfied in the instant case. The statute involved here clearly creates a federal right in favor of Bakke. The legislative history of Title VI reveals that Section 2000d,

> "which is a statement of substantive right—a substantive right of individuals, of persons, not to be discriminated against or excluded from participation in or denied the benefits of any program or activity receiving Federal assistance —means exactly what it says. It does not provide a method of enforcement, by itself; but I suggest that it is complete . . . ." 110 Cong. Rec. 5255 (1964) (remarks of Sen. Case).

As to the legislative intent and purpose respecting the appropriate form of remedy, the congressional

debates over Title VI imply that private actions are permissible to secure the rights granted by the statute. The administrative enforcement procedures authorized by Section 2000d-1 were not intended by the legislature to limit in any way the "substantive right of individuals" established by Title VI. The further remarks of Senator Case illustrate the point:

> "I do not wish to quibble about this; but I wish to make clear that the words and provisions of section [2000d] and the substantive rights established and stated in that section are not limited by the limiting words of section [2000d-1] . . . My only point is that I do not want my embracement of this bill to be construed as indicating that I believe that the substantive rights of an individual, as they may exist under the Constitution, or as they may be stated in section [2000d], are limited in any degree whatsoever." *Id.*

The enforcement procedures adopted by the various Federal funding agencies are designed to terminate Federal funding rather than adjudicate individual complaints. Although the agencies are encouraged by the statute and the regulations to effect voluntary compliance,[14] they are not empowered to order such compliance.[15] Indeed, when the Court considers the

[14]42 U.S.C. §2000d-1; 45 C.F.R. §80.7(d).

[15]45 C.F.R. §§80.7(d), 80.8, 80.10(f). The regulations themselves make clear from the outset that they apply to "money paid, property transferred, or other federal financial assistance". 45 C.F.R. §80.2. Nowhere in the regulations is there mention of HEW's power to issue injunctive orders to correct instances of racial discrimination. As we explain below (note 16, *infra*), HEW's authority is geared to the denial or revocation of Federal funding.

situation confronted by an individual victim of racial discrimination, the need for a private right of action is clear. The Federal funding agency usually will not have been advised of the statutory violation until after it has occurred. The administrative procedures, however, aim at the revocation of *future* Federal funding; they are not designed to mandate a remedy for previous discrimination by a recipient of such funds.[16] If, for example, the recipient chooses to suffer a future funding cutoff rather than revise its program, persons victimized by the previous conduct simply have no administrative remedy. The plain solution to this problem is to permit individuals to seek injunctive relief under Title VI. Such a rule squares with long standing judicial policy:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood,* 327 U.S. 678, 684 (1946).[17]

[16]45 C.F.R. Section 80.10(f), which governs the content of HEW orders, provides in part:

> "The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part . . . and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance . . . will thereafter be extended . . . to the applicant or recipient . . . [who has] failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation."

[17]The question of whether the private right of action under Title VI encompasses a right to sue for damages should properly be reserved for a later case. Bakke's complaint does not seek damages, but rather, a court order requiring petitioner to admit him to the Davis Medical school. *See* note 18, *infra.*

The final consideration set forth in the *Cort* case, *supra,* can be disposed of with little discussion. The protection of Federal civil rights certainly is not an area "traditionally relegated to state law". It is an area worthy of vigilant judicial protection. The recognition of a private right of action under Title VI grants that very protection to individuals who seek to assert their statutory right to be free from racial discrimination in Federally funded programs.

III.

BAKKE WAS NOT REQUIRED TO RESORT TO HEW ADMINISTRATIVE PROCEDURES PRIOR TO COMMENCING THIS LITIGATION.

Closely related to the private right of action issue is the question of whether Bakke is required to employ HEW Title VI administrative procedures prior to filing suit. Whether this question is couched in terms of "primary jurisdiction" or "exhaustion of administrative remedies" the answer is the same. Bakke is not required to resort to administrative procedures.

It must be borne in mind that Bakke's complaint contains three related causes of action: mandamus, injunctive relief, and declaratory relief. R. 1-5. But the causes of action seek the same result: Bakke's admission to the medical school. The prayer of the complaint is explicitly clear on this point.[18] At no place in the complaint (or anywhere else) has Bakke

[18]The prayer in Bakke's complaint asked the trial court to "issue its alternative Writ of Mandate directing [petitioner] to admit [Bakke] to said medical school, or to appear before the [trial court] and show cause why said admission to said medical school may be denied [Bakke].

. . . [I]ssue its order directing [petitioner] to appear and show cause why [it] should not be enjoined during the pendency of this action and permanently from denying [Bakke] admission to said medical school.

. . . [E]nter its judgment declaring that [Bakke] is [entitled to admission to said medical school; and, further declaring, that [petitioner is] lawfully obligated to admit [Bakke] to said medical school.

. . . For such other and further relief as to [the trial court] may seem proper." R. 4.

asked for the remedy which is the gist of the administrative procedure, to wit, the withdrawal of the University's Federal funding. Bakke simply was not required to pursue a remedy which was not encompassed in the relief he sought.[19]

The HEW administrative procedures support this proposition, for they do not even require the filing of an individual complaint.[20] Moreover, even if Bakke chooses to file such a complaint, there is no prescribed procedure for HEW to resolve his individual grievance. As noted earlier, HEW's power is to cut off Federal funding.[21] If the recipient decides to let a funding cutoff stand rather than correct its discriminatory conduct, then there is no administrative procedure available to protect the rights of persons, such as Bakke, who were discriminated against during the

[19]Additionally, it is obvious that the State Superior Court could not have ordered a termination of the school's federal funding; nor did Bakke seek to join HEW as a defendant.

[20]45 C.F.R. Section 80.7(b) (emphasis added) provides in part: "Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part *may* by himself or by a representative file with the responsible Department official or his designee a written complaint."

[21]*See* note 16, *supra.*

period in which the recipient was receiving Federal funds.

The nature of the administrative procedure is to resolve disputes between HEW and the recipient, not between the recipient and individual victims of discrimination. Although Bakke may file a complaint with HEW, and will be sent notice of a hearing,[22] if and when one is held,[23] there is no provision whatever for him to participate in the hearing.[24] The regulations do not provide that he may be represented by counsel at the hearing,[25] or that he may present evidence, cross-examine witnesses, or submit a brief.[26] The administrative procedures do not even extend to Bakke the right to appeal from an adverse ruling.[27] Indeed, the procedural regulations themselves make scant reference to an individual complainant; they refer primarily to "the Department" and "the recipient".[28] In reality these regulations grant Bakke

[22]45 C.F.R. §80.9(a).

[23]45 C.F.R. §§80.7(d), 80.8(c) and 80.9(a).

[24]The hearing itself may be held so far away from the site of the discriminatory act, or from the complainant's residence, that it is too inconvenient for him to participate in the procedure. As set forth in the regulations, the hearing "shall be held at the offices of the Department in Washington, D.C." 45 C.F.R. §80.9(b). Only the inconvenience of the funded institution or of HEW—*rather than of the complaining party*—can require that an alternate hearing site be selected. *Id.*

[25]45 C.F.R. §80.9(e).

[26]45 C.F.R. §80.9(d).

[27]45 C.F.R. §80.10(a), (e).

[28]*E.g.*, 45 C.F.R. §80.9(c):

> "In all proceedings under this section, *the applicant or recipient and the Department* shall have the right to be represented by counsel."

The words "applicant or recipient" refer to the funded institution. *See* 45 C.F.R. §80.13(i), (k).

no remedy and, hence, there is no reason for a court of law to abstain from hearing his Title VI claim.[29]

The Court's previous decisions amply support Bakke's right to seek a judicial resolution of this dispute. In *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956), the Court announced the rationale behind the doctrine of primary jurisdiction and the rule requiring exhaustion of administrative remedies:

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

These concerns do not require judicial deference to HEW. Respecting primary jurisdiction, the Court noted in *Western Pacific* that "[n]o fixed formula

[29]Bakke did file a complaint with HEW. R. 281. The complaint, however, asked for no specific relief; it did not request that HEW order the University to admit Bakke, nor did it request that HEW terminate the University's Federal funding.

exists" for applying that doctrine. 352 U.S. at 64. The Court, however, has considered two central factors which may prompt judicial deference to an administrative agency. The first consideration is the desire for uniformity, which would result if a duly authorized body passed initially on certain types of administrative questions. The second consideration is that of agency expertise. *See Far East Conference v. United States,* 342 U.S. 570 (1952); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907).

The interest of uniformity would not have been advanced by referring this matter to HEW because the Department has no specific procedure for adjudicating such questions as individual admissions to professional schools. The second consideration—administrative expertise—applies basically in cases involving technical questions confined to specialized tribunals.[30] The instant case, in contrast, concerns a fundamental Federal civil rights issue. The judiciary, rather than HEW, is the appropriate forum for the resolution of that issue.

---

[30]As the Court observed in Far East Conference v. United States, 342 U.S. 570, 574 (1952):

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress should not be passed over."

Examples of such cases include Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973) [reference to Food and Drug Administration on question of whether particular drugs containing pentylenetetrazol are "new drugs" under Food, Drug and Cosmetic Act of 1938 (21 U.S.C. §321(p)(1))] and Texas & Pac. Ry. Co. v. American Tie & Timber Co., 234 U.S. 138 (1914) [reference to Interstate Commerce Commission on question of whether oak railroad ties constitute "lumber" under tariff provision].

The rule of exhaustion of administrative remedies likewise does not apply in this situation. Although the rule has been applied in a number of different circumstances, it is, "like most judicial doctrines, subject to numerous exceptions." *McKart v. United States,* 395 U.S. 185, 193 (1969) (footnote omitted). The exhaustion doctrine is asserted most often in cases where the relevant statute provides an *exclusive* administrative remedy. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938). In the present case, there is no exclusive administrative remedy, or any Federal mechanism, which would adjudicate Bakke's individual complaint. Consequently, there is no need for the Court to be concerned with premature judicial interruption of the administrative process. *McKart v. United States, supra.*[31]

---

[31]45 C.F.R. Section 80.8 does not prohibit individuals who have been discriminated against from suing under Title VI. Section 80.8(a) clearly refers to action to be taken by HEW, not individual complainants. HEW, for example, may refer the matter to the Department of Justice with a recommendation that appropriate proceedings be brought "to enforce any rights of the United States . . . ." The text of Section 80.8(a) reads as follows:

> "(a) . . . If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law."

Section 80.8(d), similarly, does not restrict the individual's right to sue. It makes no reference whatever to individual com-

The decision in *Rosado v. Wyman*, 397 U.S. 397 (1970), follows the above analysis. *Rosado* involved a conflict between state and Federal welfare regulations. The respondents in that case argued that HEW was the appropriate forum, at least in the first instance, for the resolution of the merits of the controversy. The Court flatly rejected that contention, stating:

> "Petitioners answer, we think correctly, that neither the principle of 'exhaustion of administrative remedies' nor the doctrine of 'primary jurisdiction' has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs." 397 U.S. at 406.

---

plainants, but rather, appears to place certain procedural limitations upon HEW. Section 80.8(d) provides as follows:

> "(d) . . . No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate."

Under this section, the Department may take no action under "other means authorized by law" until it has determined that voluntary compliance is impossible and until it has notified "the recipient or other person" of a failure to comply with the statute. The "other person" referred to would obviously be an employee or agent of the recipient. He could not be a complainant (such as Bakke) because such a complainant would not be in a position "to comply with the regulation and to take such corrective action as may be appropriate". Indeed, a careful reading of the entire regulatory scheme reveals that when the regulations are intended to refer to an individual complainant, they do so expressly. *See, e.g.*, 45 C.F.R. §80.9(a) (emphasis added), which provides in part:

> "*The complainant*, if any, shall be advised of the time and place of the hearing."

A further indication that the regulations do not restrict an aggrieved party from commencing litigation stems from the fact that Section 2000d does not include, nor has HEW adopted, a procedure for issuing "right to sue" notices to individual complainants. Compare the Title VII procedure (42 U.S.C. §2000e-5(f)(1)).

Bakke is in precisely the same situation. Like the plaintiffs in *Rosado*, he properly chose to proceed with litigation. Thus, it remains only to consider whether petitioner's method for selecting medical students violates the statutory command of non-discrimination.

IV.

THE SPECIAL ADMISSION PROGRAM VIOLATES TITLE VI.

A. The Program Violates the Plain Language of Section 2000d.

Title VI of the Civil Rights Act of 1964 provides that:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

To prove a statutory violation, two things must be shown. The first, obviously, is a program or activity receiving Federal financial assistance. The second is the fact that the complaining party was either excluded from participation in the program or activity, denied the benefits thereof, or subjected to discrimina-

tion under the program on the ground of race, color, or national origin. Both of these factors are present in the instant case.

In the trial court, the University admitted and alleged the receipt of Federal financial assistance. R. 24, 29.[32] In addition, HEW regulations establish that the Davis Medical School is a "program or activity" within the meaning of the statute.[33] As to the act of discrimination, the facts of this case are beyond dispute. The University adopted a racial quota system to govern admission to the Davis Medical School and thereby prevented Bakke—solely because of his race—from competing for 16 of the 100 places in the first year class.

Petitioner cannot validate the special admission program on the theory that, although Bakke was excluded, persons of his race filled most of the places in the first year class.[34] The statute itself declares that "no person" shall be excluded on racial grounds. Bakke's rights under this provision are individual and substantive;

[32] *See also* Tr. or Oral Arg. at 23:

"QUESTION: Well, is it clear in the record that this institution is within the coverage of Title VI?"

"MR. COX: All medical schools get grants, including the one in effect, grants per student. So we can't seriously deny it."

[33] 45 C.F.R. Section 80.13(g) defines the term "program" as used in the statute. It includes *any* program, project, or activity "including education or training" which is ". . . provided through employees of the recipient. . . ."

The statutory prohibition against denying the "benefits" of a program to an individual because of his race covers "*any* . . . benefits provided with the aid of Federal financial assistance . . . and *any* . . . benefits provided in or through a facility provided with the aid of Federal financial assistance. . . ." *Id.* (emphasis added); *see also* §80.3(b)(4).

[34] Brief for Petitioner at 79.

they are not group rights. Thus, in considering whether Bakke's rights were violated, the Court must examine how *his* application was treated, and not whether the University admitted some other persons of his race.

Nor can petitioner validate the program on the theory that members of Bakke's race "control" the admission process.[35] The fact that other persons of Bakke's race may have composed a majority of the admission committee cannot dispel the fact that he was discriminated against. As the Court noted in *Castaneda v. Partida,* 430 U.S. 482, 499 (1977):

> "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."

The Civil Rights Act of 1964 prohibits racial discrimination against any person. The statute "tolerates *no* racial discrimination, subtle or otherwise." *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 281 n.8 (1976) (emphasis by the Court); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801 (1973). On its face, petitioner's quota arrangement violates the Title VI command of nondiscrimination. "A reading of . . . Section 2000d . . . is all that is needed for authentication of this conclusion." *Uzzell v. Friday,* 547 F.2d 801, 804 (4th Cir. 1977).

[35] *Id.* at 73. For the racial composition of the 1972-73 Admission Committee at the Davis Medical School, see R. 250-52.

B. The Legislative History of the Civil Rights Act of 1964 Indicates that Racial Preference Programs such as Petitioner's Quota are Illegal.

As the Court has noted on several occasions, the central purpose of the Civil Rights Act of 1964 is to eliminate racial discrimination. *Trans World Airlines v. Hardison,* 97 S.Ct. 2265 (1977); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). When it enacted this body of law, Congress was well aware of the injustice that occurs whenever a person's race determines whether he is to be hired or fired, promoted, allowed to vote, permitted to rent public accommodations or to participate in a Federally funded program. To remedy this situation, Congress enacted a body of law that prohibits the use of race in the making of such decisions.[36] The central command of the statute is for nondiscrimination. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co., supra,* 401 U.S. at 430-431.

The Court's decision in *McDonald v. Santa Fe Trail Transportation Co., supra,* clearly indicates that nondiscrimination is the gravamen of the Act. In *McDonald,* the Court unanimously held that Title VII of the Act protects all persons to the same degree:

> "This conclusion is in accord with *uncontradicted legislative history* to the effect that Title VII was intended to 'cover all white men and white women and all Americans' . . . and create an 'obligation not to discriminate against whites' . . . . We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes. . . ." 427 U.S. at 281 (emphasis added).[37]

[36] *See* Title I of the Civil Rights Act of 1964 (42 U.S.C. §1971 [voting]); Title II (42 U.S.C. §§2000a, *et seq.* [public accommodations]); Title VI (42 U.S.C. §§2000d, *et seq.* [Federally assisted programs]); and Title VII (42 U.S.C. §§2000e, *et seq.* [employment]).

Another of the Court's recent Title VII cases is to the same effect. In *Trans World Airlines, Inc. v. Hardison, supra,* the Court observed:

> "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities." 97 S.Ct. at 2270 (footnote omitted).

Although these cases involved Title VII, and not Title VI, the foregoing principles apply with equal force to both Titles. The plain fact is that the Civil Rights Act of 1964 was enacted as a single legislative package, designed to eliminate racial discrimination "against majorities or minorities". In construing one Title of the Act, the Court should not look to the

[37] The Court noted in *McDonald* that it was not considering the validity of an "affirmative action" program. 427 U.S. at 281 n.8. For the reasons set forth in our earlier brief, the same may be said of the instant case, for there is a clear distinction between petitioner's quota system and the concept of "affirmative action". *See* Brief for Respondent at 35-39.

intricacies of a particular section, but rather, should "look to the provisions of the whole law and to its object and policy." *United States v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113, 121 (1849). *See also Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC,* 420 U.S. 395, 402-403 (1975); *Richards v. United States,* 369 U.S. 1, 11 (1962).

Title VI, like Title VII and the other parts of the Civil Rights Act of 1964, is designed to end *all* racial preferences.

> "All this bill provides is that when money of the taxpayers of the Nation is used to support a program in a particular State, the program must be administered in accordance with the American way—in other words, that in connection with the program, it will not be permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin." 110 Cong. Rec. 6047 (1964) (remarks of Sen. Pastore).[38]

Legislative aversion to preferential racial quotas was voiced most often during the debates over the effect of Title VII. These discussions are pertinent to the instant case in that they demonstrate beyond doubt that the purpose of the Act is to eliminate racial discrimination in general, and to eliminate any deliberate attempts to maintain a particular racial balance.

> "There is no requirement in title VII that an employer maintain a racial balance in his work-force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." 110 Cong. Rec. 7213 (1964) (memorandum of Sens. Clark and Case).

[38] *See also* BUREAU OF NAT'L AFFAIRS, INC., THE CIVIL RIGHTS ACT OF 1964, OPERATIONS MANUAL (1964) at 91.

The Justice Department of the United States took the same position. At the request of Senator Clark, the Justice Department prepared a rebuttal to arguments that Title VII would require racial quotas. The Justice Department position paper argued as follows:

> "There is no provision, either in title VII *or in any other part of this bill,* that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, *what the civil rights bill seeks to accomplish* is equal treatment for all." 110 Cong. Rec. 7207

(1964) (reply to arguments made by Sen. Hill) (emphasis added).[39]

Applying these principles to the present case, we recognize that petitioner's special admission program is a "deliberate attempt to maintain a racial balance" and, as such, involves a violation of the statute because it requires admission decisions to be made on the basis of race. The fact that petitioner's special admission program constitutes a racial quota removes the issue from doubt for, as the Clark-Case memorandum, *supra,* notes, "Quotas are themselves discriminatory". 110 Cong. Rec. 7218 (1964).[40]

---

[39]The Justice Department apparently is still of the same opinion. *See* Brief of United States as Amicus Curiae at 51, 11A (Appendix D).

[40]The argument that Congress has approved the use of racial quotas by failing to amend the statute to expressly prohibit them carries little persuasive force. A variety of considerations makes it impossible to discern a cogent legislative intent from the defeat of a particular measure, or inaction on another. For example, an amendment could have been rejected on procedural grounds, such as a vote having been called for prior to the legislators having had a sufficient opportunity to study the proposed change in language. It also could have been that Congress considered the amendment unnecessary in light of the clear language contained in the original statute. A further complication is that even a proposal supported by a majority could have fallen prey to, and been frustrated from passage by, a powerful minority, be it an influential lobby, a subcommittee or an *ad hoc* coalition of congresspersons. *See* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice,* 122 U. Pa. L. Rev. 810, 830-32 (1974). Thus the Court has noted that:

"Legislative silence is a poor beacon to follow in discerning the proper statutory route.

* * *

The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens awareness, preoccupation or paralysis. 'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.'" Zuber v. Allen, 396 U.S. 168, 185 & n.21 (1969); *see also* Girouard v. United States, 328 U.S. 61, 69 (1946).

The legislative history of the Act is important in reviewing petitioner's special admission program. Petitioner's quota clearly grants preferential admission to members of certain racial and ethnic groups, to the exclusion of others. As such, it is clearly at odds with the legislative will that racial preferences be eliminated from programs receiving Federal financial assistance.

C. The HEW Title VI Regulations Themselves Prohibit Racial Quotas.

All Federal departments and agencies empowered to extend Federal financial assistance are authorized by Title VI to issue rules and regulations which shall "effectuate the provisions of [S]ection 2000d." 42 U.S.C. §2000d-1. In this case HEW has promulgated certain regulations.[41] These regulations, however, do not support the University's case. They clearly rule out its racial quota admission policy.[42]

The basic rule is spelled out at 45 C.F.R. Section 80.3, which provides in part:

"A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

* * *

---

[41]*See* 45 C.F.R. Part 80, §§80.1-80.13.

[42]The very title of the regulations reads "NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE . . ." 45 C.F.R. Part 80.

> . . . Treat an individual differently from others in determining whether he satisfies any admission, enrollment, *quota,* eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid or other benefit provided under the program. . . ." 45 C.F.R. §80.3(b)(1)(v) (emphasis added).[43]

The regulations provide a series of examples which illustrate particular situations in which discrimination is prohibited. At 45 C.F.R. Section 80.5 (c) the regulations provide:

> "In a research, training, demonstration, or other grant to a University for activities to be conducted in a graduate school, discrimination in the admission and treatment of students . . . is prohibited. . . ."[44]

The HEW regulations make clear that if the University's admission policy placed a limit on the

[43]Section 80.3 also provides that it shall be unlawful for a recipient, on the ground of race to:

> "Deny an individual any service, financial aid, or other benefit provided under the program . . . [or]
>
> • • •
>
> . . . Subject an individual to segregation or separate treatment on any matter related to his receipt of any service, financial aid, or other benefit under the program . . . ."

45 C.F.R. §80.3 (b)(1) (i), (iii).

[44]*See also* 45 C.F.R. Section 80.3(b)(2), which provides in part:

> "A recipient, in determining . . . the class of individuals to whom, or the situations in which . . . services, financial aid, other benefits, or facilities will be provided . . . or the class of individuals to be afforded an opportunity to participate . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. . . ."

number of minority persons who could be admitted, and thereby caused a single minority individual to be prevented from entering the medical school, the policy would violate Title VI. The same rule should apply to Allan Bakke for, as noted above, the University may not treat him "differently from others in determining whether he satisfies any admission . . . quota. . . ." 45 C.F.R. §80.3(b)(1)(v), *supra.*

It is plainly no answer to Bakke to argue that the University's special admission program discriminates in isolated cases and therefore cannot reasonably be said to burden whites as a group unduly. There is no exception in the Act, or in the regulations promulgated under it, for "isolated cases" of racial discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281 n.8 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Despite the University's contention in the court below, the Title VI regulations do not authorize the instant quota system. The University specifically relied upon 45 C.F.R. Sections 80.3(b)(6) and 80.5(j), notwithstanding the fact that these provisions were adopted by HEW *after* Bakke's 1973 rejection.[45] Section 80.3(b)(6) provides that a recipient "even in the absence of . . . prior discrimination" may take "affirmative action" to overcome the effects of conditions which resulted in limiting participation of persons of a particular race, color, or national origin. Section

[45]The regulations appearing at 45 C.F.R. Sections 80.3(b)(6) and 80.5(j) became effective on August 6, 1973. 38 Fed. Reg. 17979-82 (1973). Petitioner rejected Bakke's application almost three months earlier, on May 14, 1973. R. 256.

80.5(j) provides some indication as to the types of permissible affirmative action:

> "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial nor nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special *recruitment* policies to make its program better known and more readily available to such group, and take *other steps* to provide that group with more adequate service." 45 C.F.R. §80.5(j) (emphasis added).

References in the regulation to "recruitment" and "other steps" do not assist petitioner. Indeed, the recruitment of minority persons was suggested as an alternative by the court below and is in no way inconsistent with the court's condemnation of the University's special admission program. *See* 18 Cal. 3d at 55. "Other steps" is a vague and undefined term; if interpreted to include a quota admission system, it would simply violate the express prohibition of other, earlier adopted HEW regulations[46] and, more importantly, would contradict the nondiscriminatory command of Section 2000d itself."

[46] *E.g.*, 45 C.F.R. §80.3(b)(1)(v). This regulation, cited at pp. 31-32, *supra*, was adopted on December 5, 1964, approximately five months after the enactment of Section 2000d. *See* 29 Fed. Reg. 16299 (1964).

HEW simply does not have the power to rewrite Title VI. As the Court has made clear on numerous occasions, regulatory power conferred by statute,

> "is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 134 (1936).

See also Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973); *Miller v. United States,* 294 U.S. 435, 439-40 (1935); *Lynch v. Tilden Produce Co.,* 265 U.S. 315, 320-22 (1924). Thus, a particular HEW regulation, such as 45 C.F.R. Section 80.5(j), "does not, and could not, alter the statute." *Dixon v. United States,* 381 U.S. 74-75 (1965).

Although there may be a wide variety of "affirmative action" measures available to petitioner in making the benefits of its medical school more widely avail-

[47] It is important to note that the regulations upon which the University relied were adopted almost nine years after the original enactment of Section 2000d. *See* note 45, *supra*. The Court has held that such regulations are entitled to little weight in interpreting a statute, particularly when they contradict "the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976).

able, racial quotas are not among them. The regulations under the statute are to this effect, but even if there were any ambiguity in the regulations, that ambiguity must be resolved in favor of the statutory command of nondiscrimination."

D. Recent Judicial Decisions Support the Conclusion that Petitioner's Special Admission Program is Unlawful.

We have noted above some of the decisions of this Court which trace the legislative history of the Civil Rights Act of 1964. Those cases set forth in plain and unequivocal language the statutory policy of nondiscrimination. Recent decisions of federal courts follow this policy and reveal that a racial preference program, even if administered in the name of "affirmative action", nevertheless contravenes Title VI.

In *Flanagan v. President and Directors of Georgetown College,* 417 F. Supp. 377 (D.D.C. 1976), for example, the plaintiff complained that in applying for financial aid at Georgetown Law Center, he was subjected to different requirements and ultimately permitted to obtain a lesser amount of financial aid than similarly situated minority students. The apportion-

[48]Indeed, there is an indication from HEW itself in the instant record that racial quotas are invalid. In a letter written to the Chancellor of the University of California, Davis, following the filing of Bakke's HEW complaint (*see* note 29, *supra*), the Regional Director of the local HEW Office for Civil Rights noted that he had received information indicating that there were "high quotas for minorities" at the Davis campus. The letter goes on to state:

> "This [the quota policy] . . . seems to reflect University policy. While it is our purpose to insure equal opportunity, *we are concerned that well-intentioned affirmative action efforts not be implemented in such a way as to promote or result in any form of discrimination prohibited by law."* R. 279 (emphasis added).

ment of funds between minority and nonminority students was on a 60-40 basis. The District Court ruled that the school's financial aid program violated Title VI and commented that:

> "While an affirmative action program may be appropriate to ensure that all persons are afforded the same opportunity or are considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing, or financial aid) in favor of one race to the detriment of others." 417 F.Supp. at 384.

The case of *Uzzell v. Friday,* 547 F.2d 801 (4th Cir. 1977), is to the same effect. In that case, the Fourth Circuit sustained a complaint that certain rules guaranteeing a minimum racial representation on the Campus Governing Council and on the Student Honor Court at the University of North Carolina violated the Fourteenth Amendment, the Civil Rights Act of 1871 (42 U.S.C. §1983), and Title VI.[49] The court stated:

> "This form of constituency blatantly fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment. A reading of them, *particularly Section 2000d,* is all that is needed for authentication of this conclusion." 547 F.2d at 804 (emphasis added).

[49]The rules at issue in *Uzzell* required that the Campus Governing Council be composed of "at least two councillors of a minority race within the student body" and that in the event that an annual election does not produce such representation, "the President of the Student Body, with the consent of the Council, shall make the number of appointments necessary to insure compliance" with the regulation. The regulations governing the Student Honor Court provided that an accused had the right to request that four of the seven judges on the trial bench of an honor court be of his or her race or sex. 547 F.2d at 804.

In another case, *Anderson v. San Francisco Unified School District,* 357 F. Supp. 248 (N.D.Cal. 1972), a District Court confronted a so-called "affirmative action" plan, designed to make certain an increase in the hiring and promotion of minority school administrators. Pursuant to the plan, the school authorities set specific hiring and promotion "goals" and "targets". The only way to meet the specified figures, however, was for the school district to hire and promote only minority candidates, while refusing to appoint or advance any nonminority candidates. The court struck down the program as violative of Section 2000d.

> "Preferential treatment under the guise of 'affirmative action' is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?" 357 F.Supp. at 249.

These decisions support the conclusion that petitioner's racial quota admission policy violates Title VI. The quota, which forced Allan Bakke to be excluded from the Davis Medical School, "blatantly fouls the letter and the spirit" of the statute.

CONCLUSION

Allan Bakke has a right not to be discriminated against because of his race. As we explained in our opening brief, the court below relied upon the Fourteenth Amendment as its basis for ruling petitioner's quota system to be invalid and, consequently, as its basis for admitting Bakke to the Davis Medical School.

Title VI of the Civil Rights Act of 1964 is an alternate ground for granting the same relief. Title VI has been part of this case from the outset and is available to Bakke as a private remedy. It is properly before the Court, and there are no circumstances which need inhibit the Court from availing itself of this statutory ground.

In one very important sense this congressional enactment may constitute a more forceful ground for deciding the case. Its language respecting admission into a Federally funded program is plain, direct, and not susceptible of varying interpretations. It simply prohibits any discrimination on the basis of race, color, or national origin. Its express language thus bars petitioner's quota and invalidates Bakke's exclusion from petitioner's medical school.

The decision of the California Supreme Court should be affirmed.

Respectfully submitted,
REYNOLD H. COLVIN,
ROBERT D. LINKS,
JACOBS, BLANCKENBURG, MAY & COLVIN,
Attorneys for Respondent.

November 16, 1977.